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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

INSURANCE COMMISSIONER OF THE
STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

GOLDEN EAGLE INSURANCE
COMPANY,

Defendant and Respondent,

JACK GINDI, Individually and as Trustee
of JRG Trust No. 219,

Claimant and Appellant.

A094851

(San Francisco County
Super. Ct. No. 984502, U2)

This appeal arises out of the court-supervised liquidation of Golden Eagle Insurance Company (Golden Eagle). Appellant Jack Gindi, individually and as Trustee of JRG Trust #219 (Gindi), contends the trial court improperly (1) denied Gindi's application for an order to show cause (OSC) without permitting him to brief the merits of his claim or submit supporting documentation, (2) disallowed him all discovery, and (3) disallowed trial by jury. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A. Claims Generally against Golden Eagle in Liquidation

After the California Insurance Commissioner (Commissioner) was appointed conservator of Golden Eagle on approximately January 31, 1997, pursuant to Insurance

Code section 1010 et seq.,¹ the trial court approved a rehabilitation plan for Golden Eagle and established the Golden Eagle Insurance Company Liquidating Trust (Trust). The Trust is governed by three deputy trustees who, by delegation, perform the Commissioner's statutory function of reviewing and determining claims filed against Golden Eagle. The court also approved transfer of Golden Eagle's insurance liabilities arising from policies issued on or after March 1, 1997, to Golden Eagle Insurance Corporation (the Corporation). The Corporation was a newly created insurance company subsidiary of Liberty Mutual Insurance Company (the new owner of Golden Eagle), and was to act as claims administrator of Golden Eagle in liquidation. The court enjoined the assertion of any legal proceeding against the Corporation for uncovered claims; holders of uncovered claims would have recourse only to the assets of Golden Eagle (or Golden Eagle in liquidation).

Pursuant to the rehabilitation plan, a claimant asserting an extra-contractual claim against Golden Eagle would have to submit a proof of claim by February 27, 1998. The deputy trustees then would review the proof of claim; if rejected, a written notice of the rejection of the proof of claim would be mailed to claimants, pursuant to section 1032.² Any claimant whose proof of claim was rejected would have the opportunity to file an OSC application in the trial court within 30 days of the mailing of the written notice of the rejection.

On February 18, 1998, the trial court entered its final order of liquidation for Golden Eagle.

In several orders, the trial court set forth the specific procedures related to the resolution of OSC applications. For example, with respect to OSCs challenging the rejection of uncovered claims (i.e., general creditor claims rather than claims for benefits

¹ All further statutory references are to the Insurance Code unless otherwise indicated.

² Section 1032 provides: "When a claim is rejected by the commissioner, written notice of rejection shall be given by mail, addressed to the claimant at the address set forth in his claim. Within 30 days after the mailing of the notice the claimant may apply to the court in which the liquidation proceeding is pending for an order to show cause why the claim should not be allowed."

arising out of the terms of a Golden Eagle insurance policy), the trial court ordered on January 8, 1999: “Pursuant to Insurance Code Section 1032, all matters arising in connection with these OSC proceedings shall be determined through the aforementioned briefing [opposition to OSC Application, reply, sur-reply], with any evidence in support of or in opposition to the OSC application to be submitted by declaration. Oral argument will be held on the date designated for hearing.”

In a February 28, 2000 order establishing revised procedures regarding OSC applications, the trial court also stated: “**12. No Discovery:** No party to an OSC proceeding shall initiate any formal discovery in this action without prior approval of this Court on good cause shown.” That same order further stated: “Oral argument will be held on the date designated for hearing and no live testimony will be permitted, except as otherwise ordered or authorized by the Court.”

B. Gindi’s Claim against Golden Eagle

Gindi’s proof of claim, dated July 28, 1997, asserted a “[c]laim for professional malpractice arising from a defectively drafted settlement agreement prepare[d] by Gary A. Freedman.” An attachment to the proof of claim stated that Golden Eagle, as malpractice insurer for Gindi’s former attorney, Freedman, should take immediate steps to help settle Gindi’s lawsuit against Freedman, adding that if the matter did not settle, the court might find it unreasonable that Golden Eagle had given no authorization for a reasonable settlement offer. “Viewing this situation objectively may lead the Court to view your handling of this claim as a breach of the implied covenant of good faith and fair dealing.”

On September 29, 1997, Gindi and Freedman settled the lawsuit. Pursuant to the terms of the confidential settlement, Golden Eagle was to fund the settlement by paying \$1.13 million to Gindi “as soon as possible.” Apparently, there was also an agreement on the record that the sum was to be paid by Golden Eagle no later than 30 days after settlement. On October 24, 1997, Gindi’s attorney sent a letter of complaint to the

Claims Services Bureau of the California Department of Insurance (with a copy to the Proof of Claim Department), in which he disclosed several of the terms of the settlement and complained that he had not yet received the promised check from Golden Eagle. He further asserted “that there is a pattern of such behavior in cases of this sort” and suggested that “the Commissioner should develop a rule requiring payment of interest by insurance carriers on late settlement payments of the sort expected in this case.”

As a result of Gindi’s October 24, 1997 letter and subsequent acts, in which he allegedly disclosed confidential settlement terms,³ Freedman filed an action on November 3, 1998, against Gindi and his attorneys for breach of contract, breach of the implied covenant of good faith and fair dealing, abuse of process, intentional infliction of emotional distress, and negligent infliction of emotional distress. That case was resolved before the present OSC proceedings were concluded.

On December 6, 1999, the Trust notified Gindi that it deemed his proof of claim to have been withdrawn due to his failure to provide additional support for his claim, as requested. On October 23, 2000, the Trust formally notified Gindi that his claim had been rejected.

C. Gindi’s OSC Application against Golden Eagle

On December 21, 1999, Gindi filed an OSC application with the trial court, seeking review of the deemed “withdrawal” of his proof of claim. In his OSC application, Gindi contended that, due to Golden Eagle’s negligence and breach of contract in failing to issue the settlement check “as soon as possible” after September 29, 1997, Gindi sent the letter of complaint to the Commissioner, which caused Freedman to “entwine[]” Gindi and his counsel in new litigation. In addition, noting that Freedman’s lawsuit was also based on Gindi’s causing entry of judgment to be brought against

³ Apparently, the settlement check was dated October 3, 1997, the envelope in which it was sent had a postmark of October 16, 1997, and it was stamped “received” by Freedman’s attorney on October 28, 1997. When he did not receive the check, Gindi sent the October 24 letter, then had judgment entered on November 6, 1997 and recorded on November 14, 1997. After Gindi received the check, the Corporation stopped payment on it. Gindi did not receive final payment until November 24, 1997.

Freedman in early November 1997, Gindi claimed that, “[t]o the extent entry of Judgment was legally caused by fault of [Golden Eagle], such as by insisting on a further settlement agreement, [Golden Eagle] is legally responsible” for the attorneys fees, costs, and other expenses incurred by Gindi and his counsel to extricate themselves from Freedman’s lawsuit.

Finally, noting that Freedman’s lawsuit was also based on Gindi’s recording of the judgment, Gindi further claimed that, “[t]o the extent recording of Judgment was legally caused by fault of [Golden Eagle], such as by insisting on return of its check and calling for years of further litigation, [Golden Eagle] is legally responsible” for Gindi’s attorney fees, costs, and other expenses. In the conclusion of his OSC application, Gindi declared his right to a jury trial on his claims for emotional distress and damages.

The Trust filed its opposition to Gindi’s OSC application, addressing the merits of his claim, on October 6, 2000. The Commissioner filed a brief in opposition to Gindi’s request for a jury trial on approximately October 13, 2000. The Trust filed a sur-reply requesting a continuance of the hearing on Gindi’s OSC application, then scheduled for October 27, 2000, and a briefing schedule for discovery and jury trial issues. The trial court rejected a proposed stipulation and OSC submitted by the parties, which contemplated an initial hearing on the discovery and jury trial issues and a hearing on the merits “shortly thereafter.”

At the October 27, 2000 hearing, the court noted that the subsequent hearing requested by the parties “would be motion for discovery, motion for sealing of documents [not relevant to this appeal] and motion for jury trial and any other motions that are appropriate at that time.” Thereafter, Gindi, the Trust, and the Commissioner filed points and authorities addressing the issues of discovery and the right to jury trial.⁴

At the December 8, 2000 hearing, the court and the parties addressed the merits of the claim, as well as the questions of discovery and jury trial. For example, the trial court

⁴ In his “Memorandum re Discovery, Trial by Jury and Protective Order,” Gindi focused on a new theory: that his claim is not against Golden Eagle, but is against the Corporation, an entity never in liquidation, which therefore would entitle him to the usual rights to civil discovery and jury trial.

asked Gindi's counsel to identify the discovery Gindi needed for the OSC proceeding that was not already obtained in either the Gindi or Freedman lawsuit. Counsel responded that Gindi could not limit his discovery requests and that he intended to pursue a claim against the Corporation, not Golden Eagle. The parties then argued the merits of Gindi's attempt to assert claims against the Corporation, including the question whether a claim against the Corporation was possible, given the parameters of his original proof of claim as well as his OSC. The hearing concluded as follows:

"THE COURT: Anything further? [¶] I want to take this matter under submission. I may have to ask for another hearing on this matter because I'm a little uncertain. . . . Let me take this matter under submission Mr. Wilson [Gindi's counsel].

"MR. WILSON: Thank you your Honor. [¶] Your Honor, if I may, just in terms of scheduling of the decision making process.

"THE COURT: You have 90 days.

"MR. WILSON: Obviously, I think discovery is the first issue and one of the important things that we need to get into is what was the role of the San Diego Insurance Company and the Insurance Corporation versus the Golden Eagle Insurance Company.

"THE COURT: All right.

"MR. WILSON: And then basically the chronology and how you come to decide not to write the check and then to stop payment on the check and things of that sort.

"THE COURT: All right. Thank you. [¶] Under submission."

The matter remained under submission for just under 90 days. On March 5, 2001, the trial court issued its order denying Gindi's OSC application on the merits, and also denying his requests for discovery and jury trial. In the order, the court stated that Gindi's OSC was heard on December 8, 2000 and that "[t]he Court has read and considered the briefs filed by the respective parties and has heard the argument of counsel[.]" The order also included the following: "GINDI accuses Golden Eagle of bad faith in its handling of the previous settlement and in demanding return of the previously

issued settlement check in conjunction with the vacating of the original judgment. Because of its dilatory conduct GINDI claims that Golden Eagle should be held responsible for the attorney fees and costs incurred in the subsequent litigation. [¶] The court finds that the TRUST did not abuse its discretion in finding that the GINDI claim is without merit in that there is no showing that Golden Eagle's conduct was the cause or a substantial contributor to the continuing legal disputes between the parties. [¶] In addition, the request for additional discovery does not appear calculated to lead to evidence of wrongdoing by Golden Eagle. The settlement draft was received by attorney Armstrong by October 28th at the latest, a date still within the original 30 day payment parameters. Further, there is no evidence that Golden Eagle played any role in advising GINDI'S attorney to write the [October 24] letter to the Department of Insurance which precipitated the subsequent litigation. [¶] Lastly, the court denies the request for trial by jury. Claims brought against insurers in liquidation or conservation under the Insurance Code are special proceedings in which jury trials are not statutorily authorized and thus are not permitted. (*Kinder v. Superior Court* (1978) 78 Cal.App.3d 574, 581.) Accordingly, the claim is denied."

On April 30, 2001, Gindi filed a notice of appeal.

DISCUSSION

Gindi contends the trial court erred in prematurely ruling on the merits of his OSC application, without giving him the opportunity to brief the merits or to submit available depositions and documents in support of his claim. He also contends the court wrongly denied his request for discovery and a jury trial.

In special proceedings involving insurers in liquidation, the trial court reviews the Commissioner's actions on a proof of claim under the abuse of discretion standard, and "[w]e also test the action of the trial court by the abuse of discretion standard. [Citation.] In this connection we employ the equivalent of the substantial evidence test by accepting the trial court's resolution of credibility and conflicting substantial evidence, and its

choice of possible reasonable inferences. [Citation.]” (*In re Executive Life Ins. Co.* (1995) 32 Cal.App.4th 344, 358.)⁵

First, we find that Gindi should never have been permitted to proceed on his OSC application, given that his proof of claim was based on Golden Eagle’s slowness to settle his action against Freedman. Once the action settled on September 29, 1997, the claim stated in Gindi’s proof of claim was resolved. His OSC application then took issue with what happened post-settlement, specifically Golden Eagle’s alleged shenanigans with the settlement check. It is clear, as a matter of law, that Gindi was not entitled to use an application for an OSC to attempt to enlarge on his original proof of claim, especially given that the claims filing period had already ended. Accordingly, Gindi’s OSC should have been dismissed at the outset, on the ground that it alleged wrongdoing distinct from and requested relief different from that stated in his proof of claim.

Alternatively, even if the trial court properly could have considered Gindi’s OSC application on the merits, we find that substantial evidence supports the trial court’s conclusion that Gindi’s claim was without merit “in that there is no showing that Golden Eagle’s conduct was the cause or a substantial contributor to the continuing legal disputes between the parties.”⁶ The record reveals that Gindi wrote the October 24, 1997 letter—which led to Freedman’s lawsuit—less than 30 days after the September 29, 1997 settlement. Moreover, as the court found, it was undisputed that Freedman’s attorney received the settlement check from Golden Eagle on October 28, 1997, also within the 30-day period after settlement. Hence, the trial court correctly found that it was Gindi’s October 24, 1997 letter breaching the confidentiality agreement, and not Golden Eagle’s

⁵ Gindi argues that he was denied a fair hearing, which is an act in excess of the court’s jurisdiction and which requires per se reversal. (See *Fewel v. Fewel* (1943) 23 Cal.2d 431, 433.) We do not agree that such a standard is applicable to the present situation.

⁶ The Trust further asserts that Gindi’s claim is not legally viable in that “Gindi is a third party claimant; he is not an insured of Golden Eagle. As a consequence, Gindi cannot assert any viable cause of action for bath faith or ‘uncovered’ claim against Golden Eagle. [Citation.] In addition, there was no contractual or other relationship between Golden Eagle and Gindi that would give rise to a duty of care.” Because these contentions do not appear to have been raised in earlier proceedings, we will not consider them for the first time now.

conduct, that caused the subsequent litigation.⁷ For this reason, the trial court rightly concluded that discovery would not lead to evidence of wrongdoing on the part of Golden Eagle within the parameters of Gindi's OSC application, and that Gindi thus had not shown the required "good cause" in support of his discovery request.⁸

At the December 8 hearing (as well as in his brief regarding discovery and jury trial issues), Gindi's attorney actually brought up a completely new theory for Gindi's claim, arguing that the Corporation, as claims administrator for Golden Eagle, was in fact the wrongdoer, having stopped payment on the settlement check and demanded its return. Therefore, according to Gindi's attorney, Gindi should have either been "cut free" and permitted to pursue a separate lawsuit against the Corporation or permitted unlimited discovery and a jury trial within the OSC proceedings, since the Corporation was not in liquidation. Not only was this theory never raised in Gindi's proof of claim or OSC application, as the Trust argued at the December 8 hearing, but the final order regarding the rehabilitation plan plainly states that no uncovered claims may be made against the Corporation itself "in any legal proceeding."

⁷ That there may have been a subsequent dispute between the Corporation and Gindi about the precise settlement amount, which stalled Gindi's receipt of the settlement monies, does not alter the fact that he disclosed the terms of the settlement agreement before the anticipated 30 days had passed after settlement was reached. Thus, it was Gindi's conduct that caused further litigation with Freedman; no conduct by Golden Eagle can be said to have caused Gindi to breach the settlement agreement by writing the October 24 letter.

Moreover, to the extent the Corporation's actions in demanding return of the settlement check and stopping payment on it could possibly be said to have "caused" Gindi to further breach the settlement agreement by causing judgment to be entered and recorded, Gindi's purported claim against the Corporation was not a viable one, as discussed in the text, *infra*.

⁸ Gindi asserts that because discovery is allowed as a matter of course in "special proceedings" (Code Civ. Proc. § 2016, subd. (b)(1)), he should be able to pursue regular civil discovery pursuant to Code of Civil Procedure section 2017, subdivision (a). This assertion is without merit. Claims against insurers in liquidation are specifically covered by the provisions of section 1010 et seq., not the Code of Civil Procedure. Furthermore, one of the court orders governing OSC procedures with respect to Golden Eagle specifically forbids formal discovery without court approval "on good cause shown."

The trial court reached its decisions on the merits of Gindi's OSC application and the discovery request based on the undisputed facts discussed in the parties' briefs and during the December 8 oral argument. Although the parties may have been somewhat confused at that hearing regarding whether there would be a subsequent hearing on the merits, by the conclusion of the hearing, the trial court made clear that it was considering both the procedural questions and the merits of the claim. If Gindi had any question about whether any further oral argument or briefing would be permitted, he should have asked the court for clarification. The court's subsequent order also shows that the discussion of the merits at the December 8 hearing, along with the discussion of the discovery request, demonstrated to the court that Gindi's proof of claim was properly denied and that no further discovery would redeem the claim. Moreover, Gindi's metamorphosed claim against the Corporation, described in his points and authorities regarding discovery and discussed at the December 8 hearing, was plainly outside the scope of his OSC as well as without merit; no additional briefing or supporting documentation could change these facts.

Finally, "[a] jury trial cannot be demanded as a matter of right in a special proceeding unless it is expressly made available by statute. [Citation.] The liquidation statute makes no provision for a jury trial in a proceeding had thereunder." (*Kinder v. Superior Court, supra*, 78 Cal.App.3d at p. 581.) Accordingly, Gindi's jury trial request in these special proceedings was properly denied.⁹

In conclusion, Gindi should never have been permitted to proceed on his OSC application. Moreover, he was given the opportunity to fully present his claim, which was patently meritless, at the December 8, 2000 hearing. The trial court did not abuse its discretion or deprive Gindi of his due process rights in denying his OSC application and

⁹ In his opening brief, Gindi concedes that any claim made solely against a liquidating insurance company would have to be tried without a jury. He argues, nonetheless that because his primary claim is now against the Corporation—a successor company not in liquidation—his jury trial claim against the Corporation is valid. As we have already explained, this theory was not raised either in Gindi's proof of claim or his OSC application; moreover, any legal proceeding against the Corporation itself is expressly forbidden in the rehabilitation plan.

requests for discovery and a jury trial. (See *Fewel v. Fewel*, *supra*, 23 Cal.2d at p. 433; *In re Executive Life*, *supra*, 32 Cal.App.4th at p. 358.)

DISPOSITION

The judgment is affirmed.

Kline, P.J.

We concur:

Haerle, J.

Ruvolo, J.